Supreme Court, U.S.
FILED
SEP 3 1991
OFFICE OF THE CLERK

No. 91-154

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Petitioner,
v.
MAGGIO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

PETITIONER'S REPLY BRIEF

MARCOS CAMACHO
P.O. Box 310
Keene, CA 93531

FRED H. ALTSHULER
ROBERT C. BELL, JR.
MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Attorneys for Petitioner United Farm Workers of America, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

Fibreboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal. App. 2d 675 (1964)	5
Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941)	3
NAACP v. Claiborne Hardware, 458 U.S. 886 (1982)	3, 4
Ocala Start-Banner Co. v. Damron, 401 U.S. 295 (1971)	5
Orr v. Orr, 440 U.S. 268 (1979)	5
Pantex Towing Corp. v. Glidewell, 763 F.2d 1241 (11th Cir. 1985)	6
Rainbow Tours, Inc. v. Hawaii Joint Council, 704 F.2d 1443 (9th Cir. 1983)	6
Stryjewski v. Local 830, Brewery Drivers, 451 Pa. 550, 304 A.2d 463 (1973)	5
United Aircraft Corp. v. Intl. Assn. of Machinists, 161 Conn. 79, 285 A.2d 330 (1971), *cert. denied*, 404 U.S. 1016 (1972), *on appeal following remand*, 169 Conn. 473, 363 A.2d 1068 (1975), *cert. denied*, 425 U.S. 973 (1976)	3, 6
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	3

Constitution of the United States:

First Amendment	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-154

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

MAGGIO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

---

PETITIONER'S REPLY BRIEF

---

1. Respondent's Brief in Opposition seeks to obscure the fundamental constitutional error in the lower court opinions by rewriting those opinions. Respondent asserts without any support that "the trial court strictly required Maggio to establish a causal nexus between the UFW's violence and each claimed item of damage." Opp. Br. at 3. Respondent also asserts, again without any citation to the record or the decisions below, that the lower courts found that "the UFW's violent conduct substantially and proximately caused each and every element of Maggio's damages." *Id.* at 11.

The trial court's own statement of its decision is *directly contrary* to respondent's assertions. In Paragraph 8 of the decision that court stated that, although the Union's unlawful picketing was "a substantial cause" of respondent's damages during the strike, "it was not the

sole cause." Pet. App. at 3a. In Paragraph 10, the trial court found *only* that "all of the crop loss" for which damages were awarded "was substantially caused by the defendant." In that paragraph, there was not even a finding that *any* of the loss was the result of *unlawful* activity as opposed to lawful picketing. *Id.* at 4a.

Taken together, these findings necessarily entail the conclusion that, in addition to unlawful activity, there was other, lawful picketing activity that contributed to respondent's losses. Nontheless, and contrary to respondent's representations, the trial court did *not* require respondent to show that it was the *unlawful* conduct that "proximately caused each and every element of Maggio's damages." Opp. Br. at 11.[1] Instead, once it found that the unlawful activity was "a substantial cause of [respondent's] damage," the trial court *shifted to the Union the burden of showing* "the extent of its contribution to [respondent's] damages, i.e., [to] distinguish the damages caused [by] lawful conduct from the damages caused by unlawful conduct." Pet. App. at 5a-6a.

In upholding the trial court, the court of appeal, too, reasoned that respondent was required *only* to show that unlawful union conduct was *a* cause of "*some* part of [respondent's] damages." Pet. App. 26a (emphasis added). That court then concluded that the Union would be liable for the entire amount of respondent's strike losses, whether due to lawful or unlawful conduct, unless the Union could "bear the burden of segregating damages." *Id.*

In sum, respondent has plainly misstated what the lower courts did in order to avoid confronting the significant legal errors made by those courts.

2. Contrary to respondent's argument, the dispute over the lower courts' rulings in this case is *not* a dispute

[1] Indeed, nowhere in its decisions did the trial court make *any* evidentiary findings concerning any particular acts of misconduct, nor did that court make *any* findings as to how any particular act contributed to any of respondent's losses.

concerning the weight or sufficiency of the evidence. The Union had the First Amendment right to publicize its strike; to seek support for its strike through picketing and other peaceful means; and thereby *lawfully* to cause all of the economic losses that respondent suffered due to its failure to harvest its crops. It is for that reason that the Constitution imposes a heavy evidentiary burden on an employer who seeks to recover damages for the consequences of unlawful activity during the course of otherwise lawful picketing. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 933-34 (1982); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Moreover, this Court's cases make equally clear that, as a matter of constitutional principle, First Amendment rights may *not* be defeated by "insubstantial findings of fact screening reality." *Claiborne Hardware*, 458 U.S. at 923-24 (quoting *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941)). Trial courts must support their decisions with findings sufficient to identify the precise impact of unlawful conduct and to make clear that state power is *not* being applied to compensate "for the consequences of nonviolent, protected activity." *Claiborne Hardware*, 458 U.S. at 918.

Had these constitutional standards been adhered to in this case, respondent would have been required to adduce specific and substantial proof that replacement workers did not come to work out of fear of unlawful coercion, and that their failure to report to work out of fear was the reason for the employer's losses. And the trial court would have been required to set forth findings sufficient to demonstrate that First Amendment freedoms were not themselves being burdened.[2]

---

[2] *See e.g., United Aircraft Corp. v. Intl. Assn. of Machinists*, 161 Conn. 79, 285 A.2d 330 (1971), *cert. denied*, 404 U.S. 1016 (1972), *on appeal following remand*, 169 Conn. 473, 363 A.2d 1068 (1975), *cert. denied*, 425 U.S. 973 (1976) (court took or reviewed testimony

Instead, the lower courts in this case made no detailed evidentiary findings whatsoever, and stated in the most conclusory fashion only that "*some* violence and public disorder" occurred. Having done that much—which as a matter of this Court's teaching is not enough—the lower courts then placed the burden on the Union to prove that respondent's strike damages were *not* the result of unlawful activity.

By so doing, the lower courts entirely ignored the constitutional requirements that this Court has imposed in order to protect First Amendment freedoms. The result was to permit respondent to secure damages for the consequences of *constitutionally protected activity*, and to enter a ruinous judgment that all but destroys the farmworkers union. This result requires this Court's review.

3. To be sure, at certain points in its Brief in Opposition, respondent pays lip service to the standards this Court has put in place to protect First Amendment rights in cases in which the conduct in question involves both constitutionally protected and unprotected activity. By claiming that in fact the lower courts placed the burden on the plaintiff-employer to show that the Union's unlawful conduct "proximately caused each and every element of Maggio's damages," respondent implicitly acknowledges that, in cases involving tortious conduct that occurs in the course of constitutionally protected activity, the plaintiff must meet a *heightened burden* of "demonstrating that fear rather than protected conduct" was the dominant cause of all of its damages. *Claiborne Hardware*, 458 U.S. at 932.

---

from more than 200 employees concerning their reasons for being absent from work during a strike, and on the basis of that evidence calculated the employer's damages due to tortious conduct during the strike as a percentage of the total strike damages; court then set forth its findings in 401 separate paragraphs covering 109 pages).

At other points, however, respondent, relying on *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675 (1964), argues that it was proper to apply ordinary tort adjudication principles, and to shift to the Union the burden of separating the consequences of lawful and unlawful activity merely upon a showing by the employer that unlawful conduct was "a" cause of "some part of the employer's damages." *See* Opp. Br. at 15-16; Pet. App. 25a-26a (quoting *Fibreboard*, 227 Cal. App. 2d at 704-05).

Because the lower courts quite clearly took that approach in this case, and because that approach is directly contrary to *Claiborne Hardware* and *Gibbs*, respondent's attempt to harmonize the decisions below with this Court's cases is unavailing.[3]

4. Respondent, moreover, *concedes* that the judgment below conflicts with the decision of the Pennsylvania Supreme Court in *Stryjewski v. Local 830, Brewery Drivers*, 451 Pa. 550, 304 A.2d 463, 466 (1973), in which the court required that the employer's damages, "to be constitutionally compensable, result[] *solely* from unlawful and violent activities, which are without protection of the first amendment." Opp. Br. at 18-19. And, as we show in the margin, respondent's efforts to explain away the conflict between the judgment below and the decisions of the

---

[3] Respondent suggests (Opp. Br. at 16-17) that in the trial court the Union somehow waived or conceded away the argument that the court's allocation of the burden of proof was constitutionally improper. The state court of appeal, however, clearly found that the constitutional question raised by the burden of proof allocation was properly before it, and court of appeal squarely decided that question on the merits. *See* Pet. App. at 25a-27a; Cert. Petition at 7 n.6. When a state appellate court finds that a federal question is properly before it and then decides that question, this Court concludes that the federal question was timely and properly raised. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971).

other state and federal courts discussed in the *certiorari* petition are unsuccessful.[4]

5. Finally, respondent contends that the second question presented in the *certiorari* petition is untimely raised, and that the Union should have sought this Court's review within 90 days of the state court's denial of a writ of mandamus to disqualify the trial judge in 1985. The Union, however, is not seeking review of the 1985 original writ proceeding. Rather, we are seeking review of the significant due process violation that occurred in the case on the merits. That violation was occasioned by the trial judge's decision to preside over respondent's suit against the Union even though the judge's wife worked for respondent as a replacement worker in the very strike at issue in the case, in which respondent sought damages

---

[4] Contrary to respondent's assertion, in *United Aircraft Corp. v. Intl. Assn. of Machinists*, the state court rejected the argument that once an employer meets ordinary tort causation standards, "the burden was on [the defendant-union] to establish the allocation of losses between peaceful strike activity and unlawful strike activity." 285 A.2d at 342. And the *United Aircraft* court also made clear that it would reject the trial court's conclusory "findings" in this case as a basis for awarding damages during the course of otherwise lawful picketing. 363 A.2d at 1071. *See* Cert. Pet. at 17-19.

Similarly, respondent is wrong in stating that there is no conflict between the judgment below and the decisions in *Rainbow Tours, Inc. v. Hawaii Joint Council*, 704 F.2d 1443 (9th Cir. 1983) and *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241 (11th Cir. 1985). Although those decisions recognize that there may be circumstances in which damages flowing from lawful persuasive conduct may not be "separable" from damages due to unlawful coercion, both make clear that the burden of demonstrating inseparability is at all times on the employer, and that a conclusion of inseparability must be supported by careful findings of fact. Thus, even where some violence occurs during the course of lawful picketing, the employer may not recover *any* damages under these decisions unless the employer can show that employees stayed away from work out of fear of violence, and not out of "union principle." *See* Cert. Pet. at 19-20.

None of the courts deciding these cases would have accepted the decisions below as a basis for the damage award against the Union in this case.

against the Union primarily for alleged unlawful coercion directed against the replacements.

The judge's failure to recuse himself in these circumstances raises significant due process issues under this Court's decisions, and infected the entire case on the merits. But there was no basis and no occasion for seeking review of that issue until termination of the case on the merits, and the second question presented is therefore properly before the Court.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

MARCOS CAMACHO
P.O. Box 310
Keene, CA 93531

FRED H. ALTSHULER
ROBERT C. BELL, JR.
MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

Attorneys for Petitioner United Farm Workers of America, AFL-CIO